EMPLOYMENT TRIBUNALS

Claimant: Miss Yvonne House

Respondent: Christopher Mallaburn t/a Hermitage Inn Hotel

Heard at: Newcastle **On:** 23 and 24 November 2021

Before: Employment Judge B N Speker OBE DL
Mr E A Euers
Mrs A Tarn

REPRESENTATION:

Claimant: In person
Respondent: Mrs Elizabeth Evans-Jarvis, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim of unfair dismissal fails and is dismissed.

2. The claim of age discrimination is unsuccessful and is dismissed.

3. The claim of unauthorised deduction from wages succeeds and the respondent is ordered to pay to the claimant the sum of £1,523.20.

4. The claim for accrued annual leave is successful and the respondent is ordered to pay to the claimant the sum of £337.45.

5. The claimant has been subjected to discrimination and the respondent is ordered to pay to the claimant the sum of £1,983.05. This includes a 15% reduction on the basis that the claimant did not exercise a right of appeal against the decision in relation to her grievance.

6. The claimant is responsible for any tax or national insurance which is due in relation to any of the payments set out above.

REASONS

Introduction

1. This claim was issued initially with an allegation of unfair dismissal set out in the claim form. It was unclear at that stage whether the claim was one of actual dismissal or constructive dismissal. The initial response filed by the respondent suggested that Mr Christopher Mallaburn was not a "legal entity" and that he had not employed the claimant, and that she had been employed by Hermitage Inn in Morpeth. Ultimately, it has been accepted that the employer at all relevant times was Christopher Mallaburn t/a The Hermitage Inn. The respondent denied the claims of unfair dismissal, age discrimination, victimisation, unlawful deduction from wages and unpaid notice.

2. At a preliminary hearing before Employment Judge Pitt on 13 January 2021 it was stated in the summary that the claimant was making three complaints, namely unfair dismissal, direct age discrimination and victimisation. The issues were identified with regard to those three claims but in addition issues were set out with regard to notice, unauthorised deduction from wages and holiday pay. This hearing had been directed at considering the issues as set out by Employment Judge Pitt with regard to those separate heads of claim.

Evidence and Witnesses

3. The claimant gave evidence on her own behalf and Mr Mallaburn gave evidence for himself.

4. The Tribunal was provided with a bundle of documents running to 238 pages. There was also an opening note on behalf of the respondent which had prepared by Gillian Creu of counsel and was dated 29 July 2021. It was stated that Gillian Creu had been intending to represent the respondent when the case had been listed earlier. Mrs Evans-Jarvis accepted the opening note as still being relevant with regard to the case being put forward on behalf of the respondent.

Findings of Fact

5. The Tribunal found the following facts.

6. The Hermitage Inn Hotel is a restaurant and pub with accommodation situated in Morpeth, Northumberland.

7. The claimant was employed as, to use her description, front of house/bar staff/waitress. Her employment was for six years. During the first two of these the proprietors were Liz and Steve Proud and then for four years the business was run by Lawrence and Jan Keers. The proprietors were tenants of the premises which owned by a brewery.

8. The claimant's employment had been transferred between the different employers under the TUPE regulations.

9. Early in 2020, the tenancy passed over to the respondent. Whilst no detailed evidence was given about this, it was stated that Lawrence Keers was in financial difficulties and it was said that he had been made bankrupt but had recommended to the brewery that Christopher Mallaburn, who had been employed in the pub as a chef for many years, was willing and able to become the tenant. He became the official tenant and owner of the business on 24 February 2020 and became the employer of the claimant and the other staff at that time.

10. The takeover of the business by the respondent was therefore undertaken within a very short timeframe without any long preparation period. The respondent instructed solicitors to deal with matters such as the setting up of the bank account in his name together with payroll and registration of PAYE.

11. This was at a time when the coronavirus pandemic was creating anxiety and uncertainty as to the future. In accordance with the national lockdown the business closed on 23 March 2020. The staff were not coming in to work because of the lockdown. Communications from Mr Mallaburn were to the effect that he was making arrangements for furlough pay to be applied for under the Government's CJRS scheme ("Coronavirus Job Retention Scheme"). There were delays with regard to this and ultimately furlough payments were not received even though all of the staff were told that they were on furlough. Staff were informed that they were entitled to statutory guaranteed pay ("SGP"). In an email to the staff Mr Mallaburn assured all of the staff that they had not been dismissed and would be required to continue to make themselves available for work and that everything was being done to rectify the position.

12. On 30 June 2020 Mr Mallaburn informed the staff, including the claimant, that there were plans to reopen the premises and all were invited to make individual sessions to receive training with regard to COVID safety procedures and working arrangements and to sign relevant policies. The claimant attended such a meeting on 3 July 2020. During that meeting the claimant maintained that Mr Mallaburn said words to the effect that he was intending to bring back younger employees because of the reduced cost of employing them and on the basis that they were more energetic. The respondent denied having made such statements.

13. On 4 July 2020 the business reopened and two members of staff returned (described as sisters and stated to be younger than the claimant).

14. On 6 July 2020 the claimant sent an email to Mr Mallaburn described as a grievance in which she took issue with regard to the alleged statements about the respondent employing younger people and his reasons for that, and as to why shifts were only being given to three younger members of staff. It was stated that the way in which work was being given out to only three members of staff who were younger, amounted to discrimination and it was stated that the claimant had taken advice from ACAS.

15. After that grievance was sent, two members of staff in the bar of similar age to the claimant were invited back to work.

16. On 13 July 2020 the respondent acknowledged the grievance and summarised the issues raised. It was stated that a consultant from Peninsula would hear the grievance on 16 July 2020 at 9.30am by telephone. Notes were taken of the

meeting/hearing between the claimant and Kuldeep Chehal who was hearing the grievance.

17. It was stated that Kuldeep Chehal interviewed the following persons as part of the grievance hearing, namely Christopher Mallaburn, Gary Wilson, Paul Conroy, Grenna Jamieson and Nieve Jamieson. The findings produced by Mr Chehal of Face2Face were that none of the grievances were upheld as to the non-provision of shifts for the claimant and the reasons for it. It was therefore dismissed in its entirety. The claimant was informed that she had the right to appeal against the decision in line with the employer's grievance policy. The appeal would be to Mr Mallaburn. The claimant did not appeal.

18. The claimant began applying for roles in other premises. It was made clear that the claimant has a full-time job elsewhere during the day and that her work for the respondent and the work for which she was applying were effectively for a second job in evenings and weekends, most particularly the latter.

19. On 23 August 2020 the claimant began employment at the Masons Arms in Warkworth on the same hours as she had been working for the respondent. This was before the report from the grievance hearing was actually issued, as it was dated Tuesday 8 September 2020.

20. On 10 September 2020 the respondent wrote to the claimant stating that the report which was attached did not uphold the grievance. The letter stated that Mr Mallaburn on the basis of the findings decided that there were no grounds to uphold but stated that there was a right to appeal against that decision and that it should be sent in writing to him within five days. As stated, the claimant did not appeal.

21. The claimant had been making arrangements during this period to investigate the possibility of a Tribunal claim and her claim was presented to the Tribunal on 15 September 2020. The matter had been referred to ACAS under the early conciliation procedure on 17 July 2020 and the ACAS certificate was issued on 17 August 2020. The proceedings are therefore in time.

Submissions

<u>The Respondent</u>

22. Mrs Evans-Jarvis asked the Tribunal to rely upon the opening note referred to both as to comments on the facts, the law and legal submissions.

23. As to the unfair dismissal claim, it was submitted that there had been no dismissal by the respondent and that the claimant had left of her own volition without notice by taking a new job at the Masons Arms on 23 August 2020. There had been no communication from her to the respondent. By her actions she had terminated her employment by taking a job to work the same hours as she was contracted to work for the respondent, therefore she had ended her employment when she took the job. As far as the respondent was concerned, the claimant had remained on the books and she had not been dismissed. Therefore, the claim should be dismissed.

24. With regard to the grievance, this had been acknowledged and then investigated using the proper procedure.

25. It was submitted that these were very difficult times for the hospitality industry and when after the lockdown the pub was able to reopen it was subject to a number of limitations including some of the time serving customers only outside, people operating within bubbles, special awareness and other provisions.

26. In relation to the furlough scheme, there was a cut-off date for new businesses. Mr Mallaburn applied for furlough payments and took every opportunity to get it. The accountant had worked tirelessly with HMRC but furlough money was not received. The Tax Office had agreed that the return form sent in by Mr Mallaburn in relation to staff for the first few weeks had been late but it was accepted that he had submitted reasonable excuse for this.

27. As to victimisation, it was accepted that the grievance submitted was a protected disclosure but that a proper process was followed.

28. With regard to discrimination, two comparators of a similar age to the claimant had been taken back to work but they were full-time employees who were relying upon this one job, unlike the claimant who had her own full-time job. There was no discrimination with regard to the claimant. Mr Mallaburn denied making the statements as to age. It did so happen that two employees who were invited to return to work were sisters living together and in the same bubble, and therefore from a COVID point of view it was safer to employ them as they were not the same risk as came from the claimant. It was submitted that the claim should be dismissed.

29. No oral submissions were made with regard to holiday pay.

The Claimant

30. The Tribunal agreed to adjourn at the end of the first day in order to give the claimant time to retrieve written submissions which she said she had prepared but were still at home. Accordingly, her oral submissions were received at the beginning of the second day.

31. The claimant said that the key question was why she did not get any hours back after 4 July 2020. She was available and had always been flexible and particularly worked on the busy shifts on Friday nights and Saturdays, together with two nights during the week. She submitted that she had been treated differently from all other employees and was the only member of staff who was not given any shifts. She was not contacted by Mr Mallaburn to discuss the position. Although promised furlough, this had not been paid and no wages had been paid except one emergency payment of £96. Because of the way she was treated she contacted ACAS and was advised as to the making of the grievance and as to her option to issue a Tribunal claim. There was no communication by the respondent with her. She was not given any explanation as to why she did not get her job back. She loved the job dearly.

Response

32. Mrs Evans-Jarvis was given the opportunity to respond. As to furlough, she referred to the documents in the bundle which were details of employee payments to the claimant which were processed by HMRC and on all three of these documents in respect of pay for 24 February, 6 March and 13 March 2020 it was stated that the submissions were late but were accepted because “reasonable excuse” was given.

She submitted that the application for furlough was unsuccessful because the respondent was not registered in time. The employees had been kept up-to-date but the process took longer than expected. The HMRC had said that the respondent had missed the eligibility date and could not be granted any further extensions or "move the goalposts again".

33. As to other staff coming back, the claimant was asked in on 3 July for training on reopening and this took place. The reason for the invitation to the two young sisters to return to work was that they were living together and could be put on the same shift, and if either of them went down with COVID then they would both isolate and this did not have the same effect as if the claimant had been working with them with additional risk. The decision was purely to do with spacing and the fact that the two sisters lived together. This was the reason why they were given the shifts.

34. Commenting further with regard to the grievance, Mrs Evans-Jarvis stated that this had been investigated independently and that the claimant could have appealed but did not do so. Instead she started working across the road in a rival pub. At no stage did she telephone Mr Mallaburn to say that she was still available for shifts.

The Law

Unfair Dismissal

35. Definition of dismissal section 95(1) Employment Rights Act 1996.

Age Discrimination

36. Section 13 Equality Act 2010.

Unauthorised deduction of pay

37. Section 13 Employment Rights Act 1996.

Holiday Pay – accrued annual leave

38. Working Time Regulations 1998

Victimisation

39. Section 27 Equality Act 2010.

Findings

Unfair Dismissal

40. In this case dismissal was not admitted. Under section 95(1) of the Employment Rights Act 1996 it is stated that an employee is dismissed by his employer if, and only if:

(a) The contract under which he is employed is terminated by the employer (whether with or without notice);

(b) He is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract; or

(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

41. In the present case there was no evidence that the respondent had dismissed the claimant. At no stage did the claimant suggest that there had been any dismissal, either orally or in writing. Indeed as late as the filing of her statement of loss in the Tribunal she stated in it, "I estimate it will take be another six months to find another suitable job, as I am still employed by yourself. I'm finding it difficult to be recruited by other venues at this moment in time". This effectively amounted to the claimant suggesting that the employment relationship was continuing. Whilst this conflicted with her having issued her application to the Tribunal, ticking the box "unfair dismissal" but not being able to point to how or when or where she had been dismissed. She also denied having resigned her employment. The respondent's position was similar in that they entirely denied having dismissed the claimant but did not suggest that she had resigned. Their case was that she had behaved in a way that was ultimately inconsistent with the employment relationship by taking on a job with a rival pub in similar hours.

42. Our unanimous finding is that there has been no dismissal in this case. At the time the application was issued, both parties appeared to accept that the employment relationship was still in existence. No case has been presented which enables the Tribunal to find that there has been a dismissal enabling the Tribunal to decide whether such dismissal, whether it be actual dismissal or constructive dismissal, was fair. Accordingly, the claim of unfair dismissal is dismissed.

Age Discrimination

43. This was a claim taken to be an allegation of direct age discrimination contrary to section 13 of the Equality Act 2010. The claimant was aged 54 and in a group which entitled her to the upper rate of the minimum wage compared with some younger employees who were entitled to the lower rate of minimum wage. The case put forward was that the respondent had refused or failed to offer the claimant shifts following the reopening of the premises in July 2020, and that this was because of age.

44. The essence of the claimant's case on this was that at the meeting on 3 July 2020 Mr Mallaburn made two comments to the claimant to the effect that he would employ "young uns" as they were cheaper than the claimant and also that they could "run up and down the stairs quicker than" the claimant. These were the points put in her grievance.

45. The statements alleged to have been made by Mr Mallaburn were entirely denied by him and he stated that the claimant's age had no bearing upon the decision to call others back to work. He stated that the offer of shifts to the two sisters who lived together was based upon health and safety reasons and protection of risks from COVID. The decision to bring back Gary and Paul was based upon the fact that the job at the pub was their main job, and in any event they were of a similar age to the

claimant which showed that he was not discriminating on the grounds of age but was making decisions for other reasons which were legitimate.

46. The Tribunal considered the matter in accordance with section 136 of the Equality Act 2010. Under section 136(2) the Tribunal must consider as follows:

> "If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

47. The Tribunal referred itself to relevant recent case law (**Igen Limited v Wong [2005] IRLR 258**; **Efobi v Royal Mail Group**; and **Ayodele v Citylink Limited**) and concluded that there were not facts from which the Tribunal could decide that the respondent had contravened section 13.

48. Accordingly, the claim of age discrimination fails and is dismissed.

Unauthorised deduction of pay

49. We heard much evidence about how Mr Mallaburn became the proprietor only three weeks before the lockdown due to the pandemic and we heard oral evidence as to steps which were apparently taken to obtain furlough payments under the CJRS. We were not provided with any documentation as to communications between Mr Mallaburn's accounts and HMRC or any evidence with regard to what decision was made about the application for furlough pay and the reasons for it. We were presented with a situation where there were merely statements to the effect that "appropriate steps were taken" to register the business and to apply for furlough payments, but as stated there was no clear evidence. What was made clear was that the employees were told that steps were being taken to obtain furlough payments to ensure that the staff received payment.

50. It should be borne in mind that the furlough scheme was introduced by the Government in order to support businesses during the pandemic and to protect and preserve employment. The scheme was to enable monies to be paid to employers in respect of their furloughed employees so that they would be supported and receiving remuneration. However, if for whatever the furlough support money is not received then the employees are entitled, under their contracts of employment, to receive their wages. Not to pay the wages is unlawful and ia unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996.

51. We find that in the present case that the claimant was entitled to receive her pay. The fact that Mr Mallaburn did not succeed in recovering furlough money did not relieve him of the opportunity to pay the claimant in accordance with her employment contract. We therefore find that she was entitled to be paid wages from 20 March 2020 to 6 July 2020, the latter date being set for reasons which will be apparent from our other decisions in this case. The wages will be awarded at 80%, which is the sum that the claimant agreed to accept by way of a variation to the contract. The award under this head is therefore 16 weeks' pay at £95.20 per week making a total award of £1,523.20. The claimant is responsible for paying any tax and national insurance which may be due on this sum.

Holiday Pay

52. We did not receive substantial evidence or submissions with regard to this part of the case. We have considered it based upon the documentation in the bundle and the written submissions, including the Schedule of Loss and the opening statement.

53. Our conclusion is that the claimant was entitled to payment for 39.7 hours accrued and this is at the rate of £8.50 per hour. The award is therefore £337.45. The claimant is responsible for paying any tax and national insurance which may be due on this sum.

Victimisation

54. This is a claim under section 37 of the Equality Act 2010. It was alleged by the claimant and acknowledged and agreed by the respondent that the grievance in writing raised by the claimant on 6 July 2020 amounted to a protected act. The claimant submitted that it was because of that protected act that she received no shifts or hours to work after 6 July 2020.

55. The respondent maintained that it dealt with the grievance in a proper way and used a person described as an "independent consultant". Mr Mallaburn's evidence was that no further shifts were offered to the claimant "because of the grievance and all that was going on". It was clear that after the staff meetings on or around 3 July other employees returned to work including Gary and Paul, but the claimant did not and was not offered any hours.

56. The evidence pointed clearly to the fact that the claimant had issued a grievance and that following this she was offered no shifts. Effectively Mr Mallaburn conceded that the reason that no shifts were being offered during what turned out to be many weeks was because of the "grievance and all that was going on".

57. The Tribunal therefore found that the claimant was subjected to detriment because she lodged a grievance against the lack of shifts offered to her (and her two colleagues). Therefore the claim of victimisation is well-founded and succeeds.

58. The award to be made to the claimant is for seven weeks' pay from 6 July 2020 to 23 August 2020 when she commenced the other job at the Masons Arms.

59. We consider that it is appropriate for there to be a reduction in the award to the claimant on the basis that she did not appeal against the refusal of her grievance. Whilst the appeal was stated to be to Mr Mallaburn himself when it should be to someone other than the person who made the decision, it would still have been proper for the claimant to consider exercising the right of appeal. We are reducing the reduction partly because of the delay in the outcome of the grievance being referred to her, bearing in mind that the claimant argued that even after she started at the Masons Arms she considered that she was still available to take hours at the Hermitage Inn Hotel, which was a job which she said she loved, and therefore once she received the result of the grievance there was still an opportunity for her to make representations to Mr Mallaburn.

60. The award under this head is seven weeks at £119 making a sum of £833.

61. As to injury to feelings, we have considered the Vento guidelines and feel that this case falls within the lowest of the three bands. An award is made to reflect the

fact that the claimant was upset at not being offered work in the pub where she was well-known and had worked for many years and that the community in Warkworth is close.

62. Therefore the calculation of the award is as follows:

Seven weeks' earnings	£833.00
Injury to feelings	£1,500.00
	£2,333.00
Less 15%	£349.95
Award for victimisation	£1983.05

63. The claimant is responsible for any tax and national insurance which is due on this payment.

Employment Judge B N Speker OBE DL

Date: 16 December 2021